IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Commissioner of Income Tax-II, Jodhpur Vs. M/s Gotan Lime Stone Khanij Udyog

(i) D.B.Income Tax Appeal No.41/2002

Commissioner of Income Tax-II, Jodhpur Vs. M/s Gotan Lime Stone Khanij Udyog

(ii) D.B.Income Tax Appeal No.42/2002

Commissioner of Income Tax, Udaipur Vs. M/s A.R.Enterprises(P) Limited, Udaipur

(iii) D.B.Income Tax Appeal No.77/2002

UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961.

Date of Judgment: Sept.06, 2007

P R E S E N T

HON'BLE MR.JUSTICE P.B.MAJMUDAR
HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.K.K.Bissa, for the appellants.

Mr.Vikas Balia)
Mr.Anjay Kothari) for the respondents.

REPORTABLE BY THE COURT: (PER THANVI J.)

1. As common questions of law with regard to the entitlement of investment allowance under Section 32A of the Income Tax

Act, 1961 (hereinafter referred-to as "the Act") are involved in these three appeals, therefore, they are being disposed-of by this common judgment.

Though the facts in three appeals are little bit different as referred hereunder:

(i) D.B.INCOME TAX APPEAL NO.41/2002:

2. In this appeal, the assessee was carrying-on business of excavation of lime stone and sale thereof. The Assessing Officer allowed investment allowance of Rs.3,30,292/- while making assessment under Section 143(3) of the Act for the Assessment Year 1990-91 on the cost of Loaders & Dumpers vide Annex.1 but the Commissioner of Income Tax passed the order under Section 263 of the Act and held that the assessee is not entitled to investment allowance under Section 32-A of the Act by holding that the dumper/loader is a motor vehicle vide Annex.2. In appeal, the Income Tax Appellate Tribunal, Jodhpur set aside the order of the Commissioner of Income Tax and restored the order of Assessing Officer granting investment allowance on Dumpers and Loaders as not being road transport vehicle vide Annex.3.

(ii) D.B.INCOME TAX APPEAL NO.42/2002:

3. In this appeal also, the assessee was carrying-on business of excavation of lime stone and sale thereof and was granted investment allowance on dumpers for a sum of Rs.2,70,747 while making assessment under Section 143(3) of the Act for the Assessment Year 1989-90 vide Annex.1, but in appeal, the Commissioner of Income Tax, Jodhpur passed the order under Section 263 of the Act that dumper is a road transport vehicle and the assessee is not entitled to investment allowance on dumpers vide Annex.2. In appeal before the Income Tax Appellate Tribunal, Jodhpur, the order of the Commissioner was set aside and that of the Assessing Officer was restored by holding that assessee is entitled to investment allowance under Section 32A of the Act on the cost of purchase of new dumpers vide Annex.3.

(iii) D.B.INCOME TAX APPEAL NO.77/2002:

4. In this appeal, the assessee was engaged in the business of running hydraulic excavators and tippers for Cement Companies on hire basis by realizing rent for operation of hydraulic excavators and tippers. The assessee claimed investment allowance on the hydraulic excavators and tippers

under Section 32 A of the Act for the Assessment Year 1992-93 for a sum of Rs.16,69,796 but the Assessing Officer declined to allow the investment allowance on the ground that plant & machinery are road transport vehicle and are not used by the assessee for his own business for the purpose of either construction, manufacturing or production of an article or thing required to be carried-on by him vide Annex.3. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax, Udaipur, who allowed the appeal and set aside the order of the Assessing Officer by holding that the machines used by the assessee are rock brokers into small pieces and not road transport vehicles and he was allowed investment allowance vide Annex.2. The Revenue went in appeal before the Income Tax Appellate Tribunal, Jodhpur, which dismissed the appeal of the Revenue vide Annex.1.

5. In all the three appeals filed by the Revenue, the orders of the ITAT have been challenged on the ground that the investment allowance granted by the Tribunal on dumpers, loaders, tippers and hydraulic excavators is against the spirit of Section 32-A of the Act. The proviso to Sub-sec(1) of Section 32A debars the road transport vehicle to be covered for the purpose of deduction on investment and it is admissible only to the assessee whose machinery or plant are owned by him and

wholly used for the purpose of business carried on by him.

6. Mr.K.K.Bissa, learned appearing on behalf of the Revenue has submitted that tippers and hydraulic excavators are road transport vehicle and are not used for the purpose of business carried on by the assessee, therefore, the Tribunal has wrongly allowed investment allowance on these so-called machines, which are used by the assessee for his own business, which have been claimed by the assessee for his own business in Appeal Nos.41 and 42 of 2002 and used on hire basis in Appeal No.77/2002. In support of his contention, he has placed reliance on the following judgments (1) M/s Birla Cement Works vs. State of Raj. reported in 129 Taxmann p.729; (2) Chief General Manager Jagannath area vs. State of Orissa reported in (1996) 10 SCC p.676; (3) CIT vs. Shiv Constructions reported in 165 ITR p.159; (4) N.C.Budharaj's case reported in 204 ITR p.412; (5) Builders Association of India vs. Union of India reported in 209 ITR p.877; and (6) CIT vs. Khaders International Const. reported in 213 ITR p.869 (Ker).

7. On the contrary, Mr.Vikas Balia and Mr.Anjay Kothari, learned counsel for the assessee – respondents, have vehemently argued that dumpers, tippers and hydraulic excavators are not road transport vehicles within the four

corners of proviso to sub-section (1) of Section 32A of the Act and are machines engaged in the business of excavation of mines by cutting them into pieces irrespective of the fact as to ultimate profit of the mines of lime stone or its pieces which goes to someone else. These excavating machines are ofcourse earth moving machines but the person who excavates mines with these machines, is carrying on business of excavation itself and is entitled to investment allowance under Section 32A of the Act. The Tribunal has rightly held while relying upon the various decisions of the High Court and the Hon'ble Supreme Court that investment allowance is admissible on these machines. In support of their contention, learned counsel have placed reliance on the following judgments (7) C.I.T. vs. Gujarat Narmada Valley Fertilizers Co. Ltd. reported in 281 I.T.R. 297(Guj); (8) C.I.T. vs. Bajrang Enterprises reported in 258 ITR 448 (Mad); (9) C.I.T. vs. Shriram Transport Finance Co. Ltd. reported in 254 ITR 558 (Mad); (10) C.I.T. vs. C.S.Anand reported in 225 ITR 573 (Pat); (11) C.I.T. vs. Sibson Construction & Co. reported in 221 ITR 468 (Gau); (12) Good Year India Ltd. vs. Union of India reported in (1997) 5 SCC 752; (13) C.I.T. vs. Mahalinga Setty & Co. reported in 195 ITR 526 (Kar); and (14) C.I.T. vs. Shaan Finance (P) Ltd. reported in 231 ITR 308 (SC).

8. We have bestowed our anxious consideration on the rival

contentions purforth by the learned counsel for the Revenue and Assessees. Section 32A of the Act relates to grant of investment allowance which was inserted by the Finance Bill of 1976 with effect from 1.4.1976. Clause 8 of the Finance Bill, 1976 seeks to insert a new Section 32A of the Act, which provides for the deduction of tax computable sums by way of investment allowance of the actual cost of certain new machinery which was initially twenty five percent of the actual cost of new machinery or plant, other than office appliances or road transport vehicles installed after 31.3.1976 for the purpose of business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the Ninth Schedule to the Act or of manufacture or production of any other articles or things by a small scale industrial undertaking. This scheme of the investment allowance was introduced broadly on the lines of development rebate. Though Section 32A of the Act has eight Sub-sections but for the relevancy of these appeals, Sub-section (1) with its proviso and Sub-section (2) are reproduced below:

> **Investment allowance.**
>
> **32A (1)** In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a

deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee:

Provided that in respect of a ship or an aircraft or machinery or plant specified in sub-section (8B), this sub-section shall have effect as if for the words "twenty five per cent", the words "twenty percent" had been substituted:

Provided (further) that no deduction shall be allowed under this section in respect of -

(a) any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest house;

(b) any office appliances or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable under Section 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year.

Explanation.- For the purposes of this sub-section, "actual cost" means the actual cost of the ship, aircraft, machinery or plant to the assessee as reduced by that part of such cost which has been met out of the amount released to the assessee under sub-section (6) of Section 32AB."

(2) The ship or aircraft or machinery or plant referred to in sub-section(1) shall be the following, namely:

(a) a new ship or new aircraft acquired after the 31st day of March, 1976 by an assessee engaged in the business of operation of ships or aircraft;

(b) any new machinery or plant installed after the 31st day of March, 1976, -

(i) for the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing; or

(iii) in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule."

9. From a bare reading of this sub-section(1), it appears that a ship or aircraft or machinery or plant specified in sub-section (2) should be owned by the assessee and wholly used for the purpose of business carried on by him. Clause-B to second proviso of Sub-section (1) of Section 32A debars road transport vehicles from the purview of deduction as investment allowance. There is no dispute with regard to the fact that in all the three appeals, loaders, dumpers, tippers and hydraulic excavators are owned by the assessee respondents. The question for determination before us is as to whether these machines are road transport vehicles and are wholly used for the purpose of business carried on by the assessee. We first take up the question of machines like tippers, dumpers and hydraulic excavators, which are either used as road transport vehicles or

not?

10. Under the Scheme of the Motor Vehicles Act, 1939, the "road transport vehicle" has not been specifically defined but the "motor vehicle" or "vehicle" has been defined under Section 2 (28) of the said Act, which reads as under:

> **"(28) "motor vehicle" or "vehicle"** means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chasis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimetres."

11. From a bare reading of this sub-section, it is clear that any mechanically propelled vehicle adapted for use on roads is a motor vehicle but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimetres. So far as the dumpers, tippers and excavating machines are concerned, they are ofcourse adapted for use upon the roads and have been defined as "construction equipment vehicle" under sub-rule (ca) of Rule 2 of the Central Motor Vehicles Rules, 1989 (hereinafter referred-to

as "the Rules of 1989") inserted by G.S.R.642(E) with effect from 28th July, 2000, which reads as under:

> **"2.Definitions.-** In these rules, unless the contest otherwise requires.-
> .....
>
> **(ca) "construction equipment vehicle"** means rubber-tyred (including pneumatic tyred), rubber-padded or steel-drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork-lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off-highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with "on or off" or "on and off" highway capabilities.
>
> **Explanation.-** A construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 kms per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."

12. Under this Clause, "excavator", "loader" and "dumpers" have been included as "construction equipment vehicle" and are termed as "non-transport vehicle" under the Explanation given to this clause. A "Non-transport vehicle" has been defined under the Rules of 1989 as a motor vehicle under sub-rule (h) of Rule 2 of the Rules of 1989 by GSR 338(E) with effect from 26.3.1993, which reads as under:

> **"2.Definitions.-** In these rules, unless the contest otherwise requires.-
> .....
>
> **(h) "Non-transport vehicle"** means a motor vehicle which is not a transport vehicle.

13. It is clear from the perusal of the above definition under the Act and the Rules that vehicles of special nature like dumpers, tippers and excavators are non-transport vehicle but they are motor vehicle within the definition of Section 2(28) of the Act. Dis-entitlement of investment allowance under Section 32A of the Act is for the road transport vehicles and not on all motor vehicles including "construction equipment vehicles" which are "non-transport vehicles". Whether the owners of the dumpers, tippers or hydraulic excavators are entitled for investment allowance under Section 32A of the Act or not, has been elaborately discussed by various High Courts and Hon'ble Supreme Court.

14. In C.I.T. vs. Gujarat Narmada Valley Fertilizer Co.Ltd. (supra 7), the Gujarat High Court while interpreting the words "road transport vehicle", has held that the tractor-trailers would not fall within the meaning of road transport vehicles and that assessee is entitled to claim investment allowance.

15. In C.I.T. vs. Bajrang Enterprises (supra 8), the Madras High Court held that the investment in the dumpers have been made by the assessee and the dumpers having been used for the purpose of mining, investment allowance was clearly allowable.

16. In C.I.T. vs. Shriram Transport Finance Co. Ltd.(supra 9), the same proposition was laid down by the Madras High Court on the mobile crane used in quarrying operations, which was not termed as road transport vehicle but was termed as an item of machinery for the purpose of depreciation under Section 32 and investment allowance under Section 32A of the Act.

17. In C.I.T. vs. C.S.Anand (supra 10), the Patna High Court has held that the dumpers are not road transport vehicles and the Tribunal was right in holding that investment allowance was allowable on the cost of new dumpers.

18. In C.I.T. vs. Sibson Construction and Co. (supra 11), the Gauhati High Court held that the dumper is an earth moving machinery engaged in heavy construction works like dam and the rule making authority has not stated that earth moving machinery was required to do some more movement on the earth and the investment allowance was allowed on the dumper

under Section 32A of the Act.

19. Hon'ble Supreme Court in Good Year India Ltd. vs. Union of India (supra 12), held as under:

> "10. A close reading of the definition of "motor vehicle" in Item 34 reveals that the striking ingredient thereof is that it should have been "adapted for use upon roads". Merely because the areas on which such heavy-movers traverse might sometimes include roads also is not enough to hold that they were "adapted for use upon roads". Such use of the heavy-mover on the road may only be ancillary or incidental to the main use of it. Emphasis in the definition must be on the words "use upon road" as those words would denote the principal or dominant use and not where it may move incidentally."

Though this was a matter of Central Excises and Salt Act, 1944 but the question of refund was there about the heavy motor vehicle adapted for use upon the roads such as dumpers and earth movers as accessible to excise duty.

20. The law cited by the learned counsel for the Revenue is distinguishable from the facts of the present case because in M/s Birla Cement Works' Case (supra 1), it was held that dumpers are motor vehicles within the definition of Section 2(28) of the Act and are entitled to be taxed under the Rajasthan Motor Vehicles Taxation Act.

21. In Chief General Manager's case (supra 2), the dumpers were subjected to tax under the Orissa Motor Vehicles Taxation Act, 1975 because they were running on the roads.

22. In Shiv Construction vs. C.I.T. (supra 3), the Gujarat High Court held that dumpers are road transport vehicles and are not entitled to development rebate under Section 33A of the Act. That was a case of development rebate under Section 33A of the Act and the question was not examined on merit, as the counsel for the assessee conceded that dumpers are road transport vehicles. In that case, the Court further observed that the Revenue cannot take up an inconsistent stand that the dumpers were road transport vehicles for the purpose of development rebate and that they were not so for the purpose of depreciation.

23. Thus, from the decisions, referred-to above, it can safely be said that under the Motor Vehicles Act, 1939, the dumpers, tippers and hydraulic excavators are construction equipment vehicles within the definition of Section 2(ca) of the Act and are non transport vehicles by virtue of explanation attached to this definition and cannot be categorized as road transport vehicles for the purpose of entitlement of investment allowance under Sec.32A of the Act.

24. The definition of construction equipment vehicle being a

non transport vehicle was inserted as late as in the year 2000 and the matters in hand are of earlier assessment year but while interpreting the provisions of a Section, the Court can take aid from the aims & objects of the Act appended with the Bill, which throw light on the legislative intent. Ofcourse, the road transport vehicle was not defined but every transport vehicle is a road transport vehicle which carries passengers or goods. A vehicle which does not carry so and is engaged in the business of excavation are earth moving machines and can safely be termed as non transport vehicle by virtue of Rule 2(h) of the Rules of 1989 inserted with effect from 26.3.1993, when the Commissioner of Income Tax decided the appeals.

25. In view of what is stated above, we find no error with the finding of the learned Tribunals that construction equipment vehicles, not being road transport vehicles, are entitled to investment allowance under Section 32A of the Act.

26. The next question which arises for consideration is with regard to the entitlement of investment allowance in respect of a machinery or a plant owned by the assessee which is wholly used for the purpose of business carried on by him. So far as the Appeals No.41 and 42 of 2002 filed by the Revenue against M/s Gotan Lime Stone Khanij Udyog are concerned, there is no

dispute that in both the appeals, the assessee was carrying-on business of lime stone and sale thereof and the loaders & dumpers were used by the assessee for its own business and were owned by it. But in the Appeal No.77/2002, the assessee was engaged in the business of running hydraulic excavators and tippers for Cement Companies on hire basis by realizing rent for operation of hydraulic excavators and tippers. The investment allowance on the purchase of these machines was disallowed by the assessing authority by treating them as road transport vehicles not being used by the assessee for his own business. But the Commissioner of Income Tax and the Tribunal both allowed the investment allowance. Learned counsel for the Revenue has argued that the orders of the Commissioner of Income Tax and the Tribunal are contrary to the spirit of Section 32A of the Act because of the fact that the assessee is not engaged in any business carried on by him but the machinery which is owned by the assessee, has been hired to various Cement factories which are carrying on the business of Cement, where the lime stone is extracted from the mines. According to him, a contractor or lessee or licensee engaged in the business of contract, cannot claim benefit under Section 32A of the Act, whereas the learned counsel appearing for the assessees have countered the arguments with the scheme of the Act and also on the basis of the law cited by them.

27. It is not in dispute that the tippers and hydraulic excavators which are used by the assessee in Appeal No.77/2002 are owned by him but they are engaged in the business of letting out the same on hire basis for Cement factories. As referred-to above, the scheme of investment allowance introduced with effect from 1.4.1976 by the Finance Act of 1976 has taken the shape of development rebate which is granted under Section 33 of the Act. Assessee cannot ofcourse claim benefit of both the Sections in the same assessment year. Now, the Section 32A of the Act has been omitted by the Finance Act of 1990. During the applicability of these provisions under Section 32A of the Act, the words "wholly used for the purpose of business carried on by the assessee" have been interpreted by the Courts on the facts of a given case, but while interpreting the language of this provision on investment allowance, the Court has also to look into the the language of depreciation allowance given under Section 32 of the Act. The depreciation allowance is confined to buildings, machinery, plant and furniture which are owned by the assessee and are used in the business carried on by him. But in order to qualify for investment allowance, the plant or machinery need not be directly used for production of an article or thing. It is suffice, if it is used for the purposes of business of manufacture or production of an article or thing. The

burden of proving that the machinery or plant has been installed and used mainly for the purpose of business of construction, manufacture or production of any article or thing, not being an article or thing falling within the Eleventh Schedule and the person claiming benefit of the provision, necessary evidence will have to be adduced by the assessee in this regard. The chronological substance of sub-section (1) requires that the machinery or plant for the purpose of claiming investment allowance:

(a) should be owned by the assessee,

(b) should be wholly used for the purposes of the business carried on by him, and

(c) should be the machinery or plant specified in sub-s(2), ie it should be machinery or plant installed in an industrial undertaking for the purposes of the business of manufacture or production of articles.

28. Whether the words "used for the purpose of carrying on business by the assessee" include the business specified under Clause(b) of sub-section (2) of Section 32A of the Act carried on by the assessee or any other industrial undertaking. The relevant

sub-section (2) reads as under:

> **32A (2)** The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following namely:-
>
> (a) xxx
> (b) any new machinery or plant installed after the 31st day of March, 1976,-
>
> (i) xxx
> (ii) xxx
> (iii) in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule."

29. This Sub-clause (iii) of Clause (b) of Sub-section (2) of Section 32A of the Act provides that a machinery or plant may be installed in any other industrial undertaking for the purpose of business. It is not confined only to the industrial undertaking owned by the assessee himself. It may be the business of hire or license because if the definition of business is read in the light of Section 28 of the Act which prescribes tax on profit and gains of business or profession, it includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture by virtue of sub-section (13) of Section 2 of the Act, which reads as under:

> **"Definitions.**
> **2.** In this act, unless the context otherwise requires,-
>
> **(13)** "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of

trade, commerce or manufacture."

30. When any commercial activity is performed by way of a transaction of business and tax is charged on its profit and gains which are carried-on by the assessee, then it cannot be said that the person giving plant or machinery on license or hire, is not doing any commercial activity of business. Therefore, the assessee, who owns machinery and plant and gives them on license or hire to various manufacturers as part of his business, cannot be deprived of the machines purchased by him of which he is owner and are installed for the business of any other industrial undertaking producing an article or thing. In a business of Cement production, lime stone is extracted from the mines. The manufacturer of Cement industrial undertaking may either himself own the excavator machines, dumpers & tippers or may hire them under some agreement with one who is owner of those excavating machines like dumpers, tippers & so on. When the owner of the excavating machines gives the same on hire, it presupposes that he has installed those machines in some other industrial undertaking and he will get profit out of it, which is charged under the Act by way of tax and when the same is charged as an income arising out of their business by way of tax, he can very well claim investment allowance because under the Scheme of Section 32A, that assessee must himself use the plant

or machinery, is absent. This has been categorically held by the law cited by the learned counsel for the assessees.

31. In CIT vs. Mahalinga Setty & Co. (supra 13), the Division Bench of the Karnataka High court while holding dumpers and tippers not covered under the criteria of road transport vehicles, also observed -

> "The contention of learned counsel for the Revenue that only the machinery which directly produces an end product is eligible for investment allowance, also cannot be accepted, having regard to the phraseology of section 32A (2)(a) as well as section 32A(2)(b)(iii). Both these provisions refer to the machinery used for the purpose of business. The purpose of business includes every activity which is necessary to carry on the business. It is not the final touches involved in a construction work that result in carrying on of the business. The various activities from the beginning to the end will be part of the business."

32. In C.I.T. vs. Shaan Finance (P) Ltd. (supra 14), the Hon'ble Supreme Court observed -

> "Section 32A is a beneficial provision in a taxing statute. Full effect, therefore, requires to be given to the language used in section 32A. As observed by this Court in C.A.Abraham v. ITO (1961) 41 ITR 425, 431 ; AIR 1961 SC 609, 612, in interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in the case of doubt in a manner favourable to the taxpayer. In the present case, the language of section 32 covers leasing or finance companies which give the machinery on hire as in the present case."

It was also a case of leasing out machinery on hire basis by the finance companies which purchased machinery and hired out the same to the manufacturer under the agreement of hire and the following reference was answered in the affirmative:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that in respect of the machinery owned by the assessee, but leased to third parties and used by them for the manufacture of article or thing, investment allowance was allowable under section 32A?"

33. Learned counsel for the Revenue has mainly relied upon the decision of C.I.T. vs. N.C.Budharaja & Company (supra 4), in which the point in dispute was about the construction of dam and the assessee was doing execution of civil engineering and structure work and consequently, deductions under section 80HH and investment allowance under sec.32A was not granted. While interpreting Section 32A of the Act, the court was of the opinion that sub-Clause (iii) of Clause (b) of Sub-section (2) of Section 32A of the Act does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions. However, the finding of the High Court as to whether the assessee is an industrial undertaking or not, no opinion was expressed because the Revenue did not

question the view taken by the High Court.

34. While affirming the view taken in C.I.T. vs. N.C.Budharaja & Company, the Hon'ble Supreme Court also dismissed the writ petition filed under Article 32 of the Constitution of India at the admission stage in Builders Associations of India vs. Union of India (supra 5).

35. In C.I.T. vs. Khaders International Constructions Ltd. (supra 6), the Kerala High Court while relying upon the decision of CIT vs. N.C.Budharaja held that Section 32A(2)(b)(iii) has no application to the construction of immovable items like dams, bridges, roads, canals etc. and that investment allowance is not available in respect of a plant & machinery used for such items. With regard to grant of investment allowance for the machinery which is used by the industrial undertaking, it was observed that the conditions i.e. user being an industrial undertaking and that it was used for the purposes mentioned, are cumulative and if either of these conditions is not satisfied, investment allowance under Section 32A cannot be earned. In the matter in hand before the Kerala High court, the question whether the assessee is an industrial undertaking, was held to be immaterial and irrelevant.

36. Without going into the merits of the cases cited by the

learned counsel for the Revenue, we are fortified by the decision of the Hon'ble Supreme Court in C.I.T. vs. Shaan Finance Pvt. Ltd. (Supra 14) that in the absence of any such requirement under Section 32A(2)(b) of the Act that the assessee must himself use the plant or machinery, investment allowance cannot be disallowed to an assessee because as observed by the Hon'ble Supreme Court in C.A.Abraham v. ITO reported in AIR 1961 SC 609 that in interpreting a fiscal statute, the court cannot make the good deficiencies and the language of the Section has to be read which is beneficial to the taxpayer which covers leasing out or hire of the machinery by the finance companies.

37. In our view, the present controversy is squarely covered by the decision of the Hon'ble Apex Court as referred above in C.I.T. vs. Shaan Finance Pvt. Ltd. (Supra 14) and we have no hesitation in holding that the construction equipment vehicles like dumpers, tippers and hydraulic excavators are not road transport vehicles and profit gained out of it by letting out them on hire basis to a Cement producer industrial undertaking cannot debar them from claiming investment allowance under Section 32A of the Act.

38. Consequently, all the three appeals are dismissed and the

findings of the learned Income Tax Appellate Tribunal are confirmed. Looking to the legal controversy involved in all the three appeals, the parties are left to bear their own costs.

(DEO NARAYAN THANVI), J. **(P.B.MAJMUDAR), J.**

RANKAWAT JK, PS